

No. 48525-7-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shelly Arndt,

Appellant.

Kitsap County Superior Court Cause No. 14-1-00428-0

The Honorable Judge Leila Mills

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. The erroneous exclusion of critical defense evidence requires reversal.....	1
A. The Court of Appeals should review de novo the improper exclusion of evidence because the court’s rulings violated Ms. Arndt’s constitutional right to present a defense.	1
B. Respondent’s argument regarding “the bounds of expert opinion” reflects a misunderstanding of expert testimony, ER 702, and ER 703.....	3
C. The court excluded the most significant portions of Mann’s proffered testimony, including his expert opinions and the underlying facts, many of which were based on his personal observations.....	7
D. Hanson’s proffered testimony was not hearsay; Respondent’s argument reflects a misunderstanding of the definition of hearsay.	22
E. The errors are not harmless beyond a reasonable doubt.	24
II. Respondent’s concessions require vacation of the felony murder and arson convictions.	24
CONCLUSION	28

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Ruhl v. Hardy</i> , 743 F.3d 1083 (7th Cir. 2014)	22
<i>United States v. Abel</i> , 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).....	23
<i>United States v. Bellomo</i> , 176 F.3d 580 (2d Cir. 1999)	22
<i>United States v. Cruz</i> , 805 F.2d 1464 (11th Cir. 1986)	22
<i>United States v. Lankford</i> , 955 F.2d 1545 (11th Cir. 1992).....	2
<i>United States v. Rivera</i> , 780 F.3d 1084 (11th Cir. 2015).....	22
<i>United States v. White</i> , 639 F.3d 331 (7th Cir. 2011).....	22

WASHINGTON STATE CASES

<i>Allen v. Asbestos Corp., Ltd.</i> , 138 Wn. App. 564, 157 P.3d 406 (2007)	9
<i>Ang v. Martin</i> , 118 Wn. App. 553, 76 P.3d 787 (2003), <i>aff'd</i> , 154 Wn.2d 477, 114 P.3d 637 (2005).....	22
<i>Davidson v. Municipality of Metro. Seattle</i> , 43 Wn. App. 569, 719 P.2d 569 (1986).....	6, 7
<i>Hood Canal Sand & Gravel, LLC v. Goldmark</i> , 195 Wn. App. 284, 381 P.3d 95 (2016).....	7
<i>In re Det. of McGary</i> , 175 Wn. App. 328, 306 P.3d 1005 (2013)	6
<i>In Re Det. of Peterson</i> , 47661-4-II, 2017 WL 411387 (Wash. Ct. App. Jan. 31, 2017)	4
<i>In re Orange</i> , 152 Wn. 2d 795, 100 P.3d 291 (2004), <i>as amended on denial of reconsideration</i> (Jan. 20, 2005)	25, 26
<i>In re Strandy</i> , 171 Wn.2d 817, 256 P.3d 1159 (2011).....	24

<i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 296 P.3d 860 (2013)5, 6	
<i>Lenander v. Washington State Dep't of Ret. Sys.</i> , 186 Wn.2d 393, 377 P.3d 199 (2016).....	1
<i>Philippides v. Bernard</i> , 151 Wn.2d 376, 88 P.3d 939 (2004).....	19
<i>Salas v. Hi-Tech Erectors</i> , 168 Wn.2d 664, 230 P.3d 583 (2010).....	23
<i>State v. Burke</i> , 163 Wash.2d 204, 181 P.3d 1 (2008)	24
<i>State v. Clark</i> , 92021-4, 2017 WL 448990 (Wash. Feb. 2, 2017)	3
<i>State v. Depaz</i> , 165 Wash.2d 842, 204 P.3d 217 (2009).....	2
<i>State v. Dye</i> , 178 Wn.2d 541, 309 P.3d 1192 (2013).....	2, 3
<i>State v. Fish</i> , 99 Wn. App. 86, 992 P.2d 505 (1999)	22, 23
<i>State v. Franklin</i> , 180 Wn.2d 371, 325 P.3d 159 (2014)	24
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	25, 26, 28
<i>State v. Gefeller</i> , 76 Wn.2d 449, 458 P.2d 17 (1969)	22
<i>State v. Hartzell</i> , 156 Wn. App. 918, 237 P.3d 928 (2010)	20
<i>State v. Hudson</i> , 150 Wash.App. 646, 208 P.3d 1236 (2009)	2
<i>State v. Hughes</i> , 166 Wn.2d 675, 212 P.3d 558 (2009).....	25
<i>State v. Iniguez</i> , 167 Wn.2d 273, 217 P.3d 768 (2009)	1, 2, 3
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010)	1, 2, 3, 6, 7, 10, 12, 14, 18, 19, 20, 22
<i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	25
<i>State v. Loughrey</i> , 47339-9-II, 2017 WL 34597 (Wash. Ct. App. Jan. 4, 2017) (unpublished).....	21
<i>State v. Posey</i> , 161 Wn.2d 638, 167 P.3d 560 (2007).....	1

<i>State v. Samalia</i> , 186 Wn.2d 262, 375 P.3d 1082 (2016)	1
<i>State v. Womac</i> , 160 Wn.2d 643, 160 P.3d 40 (2007)	25, 26
<i>State v. Young</i> , 158 Wn. App. 707, 243 P.3d 172 (2010)	20, 21
<i>Volk v. DeMeerleer</i> , --- Wn.2d ---, 386 P.3d 254 (Wash. 2016)	17

WASHINGTON STATE STATUTES

RCW 10.95.020	27
RCW 10.95.030	25, 27
RCW 9A.32.030.....	25
RCW 9A.48.020.....	26
<i>State v. Benn</i> , 161 Wn.2d 256, 165 P.3d 1232 (2007)	27
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995)	27
<i>State v. Hylton</i> , 154 Wn. App. 945, 226 P.3d 246 (2010)	27
<i>State v. Whittaker</i> , 192 Wn. App. 395, 367 P.3d 1092 (2016)	28

OTHER AUTHORITIES

ER 401	9, 12, 14, 18, 20, 23
ER 402	9, 12, 14, 18, 20, 23
ER 702	3, 5, 18, 19
ER 703	3, 5, 9, 12, 14, 18, 20
National Fire Protection Association 921: <i>Guide for Fire and Explosion Investigations</i> (2011) (NFPA 921)	4

ARGUMENT

I. THE ERRONEOUS EXCLUSION OF CRITICAL DEFENSE EVIDENCE REQUIRES REVERSAL.

- A. The Court of Appeals should review *de novo* the improper exclusion of evidence because the court's rulings violated Ms. Arndt's constitutional right to present a defense.

Appellate courts review constitutional issues *de novo*. *Lenander v. Washington State Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). Even a discretionary decision is reviewed *de novo* if the error is alleged to violate a constitutional right. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

Thus, for example, the *Jones* court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719.¹ Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. The *Iniguez* court specifically pointed out that review would have been for abuse of discretion had not the defendant argued a constitutional violation. *Id.*

Although evidentiary rulings are ordinarily reviewed for an abuse

¹ Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

of discretion,² review is *de novo* where such a ruling violates a constitutional right. *Id.*; *Jones*, 168 Wn.2d at 719.³ Here, as in *Jones*, Ms. Arndt alleges a violation of her constitutional right to present a defense. Review is therefore *de novo*. *Jones*, 168 Wn.2d at 719.

This means that the Court of Appeals should apply a *de novo* standard to the trial court's decision excluding the evidence and to the impact of that decision on Ms. Arndt's right to present a defense. *Id.* Although Respondent agrees that constitutional errors are reviewed *de novo*, the state erroneously argues for an abuse of discretion standard regarding the exclusion of the evidence. Brief of Respondent (RSP), p. 30.

Respondent fails to address *Iniguez*, or the language in *Jones* requiring *de novo* review. *Id.*; *Iniguez*, 167 Wn.2d at 280-81. As those two cases make clear, the proper standard of review is *de novo*. *Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 280-81.

The Supreme Court's decision in *Dye* does not compel a different result. *See State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013). Although the *Dye* court indicated that merely alleging a violation of the "right to a fair trial does not change the standard of review," it did so without citing *Iniguez* or *Jones*. *Id.*, at 548. In fact, the petitioner in *Dye* did not ask the

² A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

³ See also *United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).

court to apply a *de novo* standard.⁴ As the *Dye* court noted, the petitioner “present[ed] no reason for us to depart from [an abuse-of-discretion standard].” *Id.*⁵

There is no indication that the *Dye* court intended to overrule the *de novo* standard articulated in *Iniguez* and *Jones*.⁶ This is especially true given the absence of any briefing addressing the appropriate standard of review in *Dye*. Accordingly, review in this case should be *de novo*, notwithstanding the *Dye* court’s *dicta*.

Under either standard, the trial court erred by excluding evidence that was relevant and admissible. This violated Ms. Arndt’s constitutional right to present a defense. *Jones*, 168 Wn.2d at 720.

B. Respondent’s argument regarding “the bounds of expert opinion” reflects a misunderstanding of expert testimony, ER 702, and ER 703.

Dale Mann is well-qualified as an expert in the field of fire

⁴ See *Dye*, Petition for Review⁴ and Supplemental Brief.. Available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20petitioner's%20supplemental%20brief.pdf> (last accessed 11/7/16).

⁵ By contrast, the Respondent did argue for application of an abuse-of-discretion standard. See *Dye*, Respondent’s Supplemental Brief, pp 8-9, 17-18, available at <http://www.courts.wa.gov/content/Briefs/A08/879290%20respondent's%20supplemental%20brief.pdf> (last accessed 11/7/16).

⁶ The same is true for of the Supreme Court’s decision in *State v. Clark*, 92021-4, 2017 WL 448990 (Wash. Feb. 2, 2017). In that case, as in *Dye*, Respondent argued for application of the abuse-of-discretion standard. See Respondent’s Supplemental Brief, p. 16, available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Resp.pdf> (last accessed 2/10/17). Petitioner did not ask the court to apply a different standard. Petitioner’s Supplemental Brief, available at <http://www.courts.wa.gov/content/Briefs/A08/92021-4%20Supp%20Brief%20-%20Pet'r.pdf> (last accessed 2/10/17).

investigation. RP 3403, 3573-96, 3717, 4050; CP 466. The prosecutor did not question Mann's credentials. RP 3407. Even though Mann resisted the label "technical review" because it carries an implication of bias,⁷ he had the training and experience to review Lynam's work and had done similar reviews numerous times. RP 4094-95, 4137, 4150; CP 449-450. His review of Lynam's work was no different in scope than the review provided by Rice at the prosecution's behest, except that Mann had the opportunity to investigate the scene before it was destroyed.

However, because the defense retained Mann, his focus differed from Rice's. Mann sought to identify and explore problems in Lynam's work, rather than performing a neutral evaluation of the fire marshal's report or pursuing his own determination of how and where the fire started. RP 3405-3406, 3717. This emphasis on deficiencies in Lynam's investigation may have affected Mann's credibility and would have been a proper subject of cross-examination. However, issues of credibility go to the weight of evidence, not its admissibility.⁸ *In Re Det. of Peterson*, 47661-4-II, 2017 WL 411387, at *4 (Wash. Ct. App. Jan. 31, 2017).

⁷ See National Fire Protection Association 921: *Guide for Fire and Explosion Investigations* (2011) (NFPA 921) §§ 4.6.2.2, 4.6.3, available at: <http://www.nfpa.org/Assets/files/AboutTheCodes/921/Ch%204%20methodology.pdf> (last accessed 8/12/16).

⁸ Similarly, when there is a dispute among experts about the particular application of a generally accepted technique, that dispute goes to the weight and not the admissibility of any results obtained. *State v. Bander*, 150 Wn. App. 690, 699, 208 P.3d 1242 (2009). The state does not claim that Mann used techniques that are not generally accepted. Nor could it, since the entire prosecution rested on Lynam's application of those same techniques. Instead, the state claims that Mann didn't properly apply those techniques in reaching his conclusions. Again, this argument goes to weight, and not admissibility. *Bander*, 150 Wn. App. at 699.

Mann employed the same methods used by Lynam, Rice, and Iskra. For example, he did some layering, took photographs, and sent material to a lab for testing. *See, e.g.*, RP 3762, 3839, 3876, 3652, 3667-70, 3679. His decision to pursue facts that helped the defense does not mean that the layering, photographs, and lab test results were somehow invalid. Nor did his alignment with the defense mean that the legitimate conclusions he drew from the facts—including facts he obtained through his own investigation—were somehow improper. The facts Mann uncovered during his investigation were admissible under ER 703. The opinions he reached based on those facts were admissible under ER 702.

Respondent erroneously relies on *Lakey* to support its argument. RSP 32-37 (citing *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 296 P.3d 860 (2013)). *Lakey* does not support Respondent's position. The plaintiff's expert in *Lakey* sought to show a link between electromagnetic fields and health problems. *Id.*, at 915. He was thus in the same position as Lynam: both were attempting to use their expertise to establish the plaintiff's case, not to evaluate another expert's work.

The defense experts in *Lakey* testified about their review of the plaintiff's expert's methodology. The defense experts were thus in the same position as Mann, providing a critique of another professional's work. In their critique, the defense experts in *Lakey* pointed out the opposing expert's failure to follow the proper methodology for establishing a link between a disease and a hypothesized cause. *Id.*, at 916. This is the same kind of testimony Mann sought to provide. No one

suggested that the *Lakey* defense experts were required to do their own epidemiological studies to prove or disprove a link between electromagnetic fields and health problems. *Id.*

Similarly, Mann sought to point out Lynam's failures. He was in the same position as the defense experts in *Lakey*. He should not have been required to conduct his own independent and neutral origin and cause determination to evaluate Lynam's work. The jury should have been allowed to hear Mann's critique, just as the *Lakey* judge heard from the defense experts in that case. *Id.*⁹

A comparable analysis applies to *In re Det. of McGary*, 175 Wn. App. 328, 306 P.3d 1005 (2013). RSP 37-39. In that case, an expert sought to testify that a sex offender's risk of recidivism was below 25%. *Id.*, at 335. He was thus in the same position as Lynam, attempting to use a scientific or technical method to establish a fact. He was not offering a critique of a colleague's work. In *McGary*, the state's representative played the role undertaken by Mann, pointing out flaws in the expert's methodology. No one suggested that the critique was flawed because the state's attorney failed to personally assess the offender's risk.

Respondent's argument regarding *Davidson* has little to do with this case. RSP 39-40 (citing *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 719 P.2d 569 (1986)). Respondent notes that "the expert's

⁹ The *Lakey* case differs from *Ms. Arndt*'s, in that the *Lakey* plaintiffs did not have a constitutional right to present evidence. *Ms. Arndt* does have such a right. *Jones*, 168 Wn.2d at 720.

opinion lacked a factual basis and was improper because he assumed facts that conflicted with eyewitness testimony...” RSP 39.

By contrast, Mann’s opinions rested on an adequate factual basis. He relied on his own observations, on photographs of the scene, on his review of Lynam’s report and other reliable written materials (such as police reports and the coroner’s report), and on laboratory tests. *Davidson* does not apply. The trial court erroneously limited Mann’s testimony. Nothing in the rules of evidence prohibit one expert from evaluating and criticizing another’s work. Nor is there a rule of evidence that prevents a defense expert from investigating facts or reviewing materials overlooked by the state’s experts.

Rice was permitted to testify, even though he went beyond the four corners of Lynam’s report in providing his own favorable opinion. RP 21, 1928-39, 2433, 2449-52, 2481, 2510, 2888, 3392, 4347. Iskra was permitted to testify without limitation, even though he did not perform a complete investigation into the origin and cause of the fire. RP 1775, 1856, 2481. The trial court’s restrictions on Mann’s testimony violated Ms. Arndt’s right to present a defense. *Jones*, 168 Wn.2d at 720.

C. The court excluded the most significant portions of Mann’s proffered testimony, including his expert opinions and the underlying facts, many of which were based on his personal observations.¹⁰

¹⁰ Respondent asserts that this court should not consider Mann’s declaration in support of Ms. Arndt’s motion for a new trial. RSP 29 n.4 (citing RAP 2.5(b)). RAP 2.5(b) concerns a party’s acceptance of benefits. Respondent cites no other authority for its argument. Where no authority is cited, this court may presume that counsel found none after diligent search. *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 296, 381 P.3d 95 (2016).

The trial judge imposed numerous restrictions on Mann's testimony. These restrictions resulted in exclusion of the most important parts of his testimony. The judge did not apply similar restrictions to the state's experts.

First, the court excluded critical evidence showing that Lynam failed to properly excavate his hypothesized point of origin. When he went to the scene, Mann discovered the melted remnant of a plastic bucket that Lynam had failed to notice. Mann used a shovel to pry the melted remnant from the cement, found that the remnant's underside was white and undamaged by fire, discovered that the floor underneath was also an undamaged protected area, and documented his investigation with photographs. RP 3666-86; CP 448-49; Ex. 345, 346, 347.

The court excluded all the testimony and photographic evidence showing the bucket had melted in place during the fire. RP 3666-86, 4029; Ex. 345-47.¹¹ The evidence would have confirmed Lynam's failure to perform a complete investigation, undermined Iskra's conclusions and his

The declaration offers a concise and organized version of the information relevant to Ms. Arndt's claims on appeal.

¹¹ Contrary to Respondent's assertion, Mann *was* "limited in his factual observations." RSP 64. He was not permitted to testify that the remnant was stuck to the floor, that he pried it up with a shovel, that its underside was white and undamaged, or that it covered a protected area. RP 3666-86, 4029; Ex. 345-347. Furthermore, counter to Respondent's argument, Ms. Arndt was not obligated to argue that Mann qualified as a fact witness under ER 601 and ER 602. RSP 64. He was presumed competent, and it was the state's burden to raise lack of personal knowledge if it believed such an objection warranted. The state did not raise an ER 602 objection at trial.

credibility,¹² and disproved Lynam's hypothesized ignition sequence (involving application of a flame to a beanbag chair).¹³ See Appellant's Opening Brief (APP), pp. 23-29. This last point was particularly important, because the prosecution relied on Lynam's ignition sequence in closing argument to establish premeditation. RP 4333-34, 4403-04.

The evidence was relevant under ER 401 and admissible under ER 402. It was also admissible to show the basis for Mann's opinions under ER 703.¹⁴ *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 579, 157 P.3d 406 (2007).

Contrary to evidence, Respondent claims that there was "no evidence establishing that the bucket was in fact there at the time of the fire." RSP 40-42. To make this erroneous claim, Respondent ignores the excluded evidence: Mann's proffered testimony that the remnant was melted stuck to the floor, that he'd pried it up with a shovel, that its underside was white, and that it created a protected area undamaged by the fire. RP 3666-86, 4029; Ex. 345-347. Mann's testimony would have contradicted the suggestion that the melted remnant was tossed into position after the fire, and Iskra's testimony that it wasn't there when Iskra

¹² Iskra insisted the bucket hadn't been there during his investigation, despite evidence proving otherwise. RP 3677, 4223; CP 448. Mann was not allowed to contradict Iskra's rebuttal testimony. RP 4266-70.

¹³ Rice supported Lynam's hypothesized ignition sequence. RP 2386-2402, 2407, 2512-2514, 2557-58. Iskra apparently supported it as well. RP 1816, 1819, 1825. Lynam himself later backed away from his beanbag theory. RP 4248.

¹⁴ Furthermore, the state did not dispute that Mann had personal knowledge, and made no objection to him as a fact witness under ER 602.

investigated (after Lynam and before Mann). RSP 40-42.

Respondent suggests that any error was “harmless beyond a reasonable doubt” because Mann provided *some* testimony about the bucket. RSP 42-43. But without the critical facts (showing that the bucket had melted and stuck to the floor during the fire), Mann’s opinions made no sense. As limited and presented to the jury, Mann’s opinions appeared to contradict the “facts”: Kelly’s testimony that the melted remnant had been tossed into position after the fire, and Iskra’s testimony that he’d examined the area carefully and found nothing. RSP 40-41.

Respondent wants it both ways—asserting that there was no evidence the bucket melted in place while arguing that the exclusion of that same evidence—that the bucket melted in place during the fire—was harmless error. RSP 40-43. But the underlying facts regarding the melted bucket were critical to Mann’s critique of the investigation. The state cannot show that the exclusion of the evidence was harmless beyond a reasonable doubt.¹⁵ The trial court’s error violated Ms. Arndt’s constitutional right to present a defense. *Jones*, 168 Wn.2d at 720.

Second, the court prohibited Mann from explaining the

¹⁵ Respondent argues that the court properly excluded evidence demonstrating the behavior and effects of burning pools of liquid. According to Respondent, the demonstration was not “substantially similar to the actual events.” RSP 43-44. But an assessment of similarity relates to the purpose of the demonstration. Mann sought to show how burning liquids behave and affect the surfaces on which they have pooled. RP 3965-4005; Ex. 465-74. The purpose of the evidence was to illustrate a general principle. No one claimed that the demonstration was a recreation of the fire conditions. The trial judge’s failure to understand this resulted in the erroneous exclusion of the evidence. This violated Ms. Arndt’s right to present a defense. *Jones*, 168 Wn.2d at 720.

significance of protected areas and a second melted plastic bucket remnant stuck to the floor near the downstairs hearth. RP 3650-52, 3661, 3665-67, 3684-85, 3959-60, 3980-82, 3740-41, 3745, 3760, 3800-03, 3893-94; CP 447. These observations led Mann to conclude that flammable material was present on the downstairs hearth, and that the area hadn't been thoroughly investigated.¹⁶ CP 447. Respondent wrongly implies that Mann was permitted to relay all the important information about the second melted remnant. RSP 44.¹⁷ This is incorrect. The prosecutor had already obtained a ruling prohibiting Mann from testifying about any testing, "including layering." RP 3661, 3667, 3684-85. The state's attorney objected as soon as she realized that Mann's testimony related to photographs showing the downstairs hearth after he'd moved some debris: "I believe that Mr. Mann actually layered this." RP 3955-56.

¹⁶ The fact that the bucket melted in place also cast doubt on Lynam's ember testing, since Lynam assumed the downstairs hearth tile was bare or covered in something equivalent to newspaper or tissue paper rather than a more flammable substance. RP 1934-36, 2383, 2813, 2817, 2881. Furthermore, contrary to Respondent's position, Lynam did not "effectively and persuasively disprove[] the whole 'magic ember' theory of origin and cause." RSP 45. Lynam's ember test used ash from a burning presto log. It is far more likely that the fire ignited with embers from the kindling used to start the fire rather than a burning presto log; presto logs do not produce sparks. RP 1583, 1929, 2505, 2872-74, 2860, 3160.

¹⁷ Respondent is correct that Mann answered a single question about the melted plastic's significance: he told the jury that it "was not identified by the previous two investigations, but was definitely present when [he] was there," and that "if you nudged it, it didn't move, it was stuck to the floor." RP 3959-60. However, the court excluded additional important evidence on the subject: the fact that it was clean and undamaged and that it covered a protected area. He testified that "if the bottom side of that plastic is in pristine condition, that says that the surface it was attached to never went above the melting point of the material that is adhered to it," but was not permitted to say that the underside of this piece of plastic was in pristine condition, and drew no conclusions from it, based on the court's ruling. RP 3960 (emphasis added).

At another point (with regard to the bucket near the couch), the court specifically ordered that “there cannot be any testimony that the bucket was in fact there during the fire[,] [a]nd certainly no testimony that based on manipulation, he knew it was stuck there.” RP 4029. As a result of the court’s numerous rulings on the subject, Mann did not testify that the bucket had melted in place, and could not fully support his testimony that Lynam and Iskra missed it during their investigations, and that flammable material was present below the living room vents at the time of the fire.¹⁸ RP 3955-56, 3960.

The excluded evidence was relevant and admissible under ER 401, ER 402, and ER 703. It undermined Lynam’s conclusions on the fire’s origin and cause, and showed that the area hadn’t been thoroughly investigated. The court’s ruling violated Ms. Arndt’s right to present a defense. *Jones*, 168 Wn.2d at 720.

Third, the court prohibited Mann from testifying that he, like the state’s experts, had reviewed police reports and other available material relating to the fire. Both Lynam and Rice reviewed these materials, and Mann testified that fire experts reasonably and routinely rely on them. RP 21, 1895, 2422-23, 2449-52, 2481, 2988.

Respondent misrepresents the record by suggesting that neither Rice nor Lynam relied on police and other reports, besides those prepared

¹⁸ He gave his opinion – that Lynam and Iskra hadn’t thoroughly investigated the area—but the excluded testimony would have explained to the jury why he held that opinion. RP 3960.

by the fire marshal's office. RSP 46-47. This is incorrect. For example, the trial prosecutor told the court that Rice "relied on the police reports." RP 21. Rice himself testified that he read incident reports from first responders. RP 2449. He testified that he read a coroner's report and the Washington State Patrol's crime lab reports. RP 2449-52. He also testified that he read Iskra's report and Mann's report. RP 1895, 2422-23, 2481. Similarly, Lynam testified that he'd reviewed "the entire case file from the sheriff's office." RP 2981.¹⁹

Respondent also misrepresents the record by implying that the only foundation for Mann's testimony was his own statement "in which he said *he* would have looked at the police reports if it had been his investigation." RSP 49. Respondent mistakenly argues that nothing in the record shows that "examination of police reports was something relied upon by experts in the field." RSP 50.

This is incorrect. Mann outlined the value of such reports at length, and repeatedly testified that fire investigation experts routinely rely on them. RP 3749-80. He concluded by telling the court that it was absolutely "common in [the] field of fire investigation that that type of information would be considered." RP 3749-51.

Among other things, Mann's testimony would have shown that it

¹⁹ He did not complete this review before writing his report, however. RP 2981-82. Respondent again misrepresents the record by suggesting that a particular report "was not available to [Lynam] before he made his origin and cause determination." RSP 48 (emphasis added, citing RP 2982). The transcript citation shows only that Lynam failed to review the entire case file before generating his report. It says nothing about the availability of any one particular report at the time of his origin and cause determination. RP 2982.

was improper for Lynam to decide on the fire's origin and cause before reviewing all the available evidence, something Lynam had admitted on cross examination. RP 2982.²⁰ The evidence was relevant (to cast doubt on Lynam's methods and conclusions) and admissible (to show the basis for Mann's expert opinions). ER 401, ER 402, ER 703. Furthermore, by excluding the testimony, the court unfairly made Mann seem less thorough than the other experts—especially Lynam—who testified that he had reviewed “the entire case file from the sheriff's office.” RP 2981.²¹

The court should have allowed Mann to testify regarding his review of police and other reports. The error violated Ms. Arndt's constitutional right to present her defense. *Jones*, 168 Wn.2d at 720.

Fourth, the court improperly excluded lab test results contradicting Lynam's assertion that polystyrene could not be detected in lab tests of charred debris.²² RP 2179-80, 3196. Through testing, Mann found polystyrene near the foosball table, but samples from the hypothesized

²⁰ Without citation to the record, Respondent suggests that “the only offer of proof was that Thomas was mistaken about whether Arndt was a smoker.” RSP 51. This is incorrect. Thomas told Lynam that he and Ms. Arndt stoked the living room fire after it died down, but he told Detective Gundrum that Darcy Veeder, Jr. (who had a post mortem BAC of .26) tried to rebuild the fire. RP 2982-83, 3294. In his offer of proof, Mann opined that “[i]nformation obtained independent from the principal investigator is of critical interest, because that has escaped, if you will, the scrutiny of the lead investigator. It's an independent way to verify certain aspects, because it has not been affected by the lead investigator at all.” RP 3750. He was not permitted to explain this to the jury.

²¹ Respondent correctly points out that defense counsel initially agreed to the state's request to limit Mann's testimony.

²² Polystyrene is a component of the beanbags, which Lynam believed were part of the ignition sequence.

point of origin yielded no evidence of polystyrene. RP 3565, 3574, 3576, 3652, 3679; CP 448. The testimony cast doubt on Lynam's credibility (since he claimed it would be worthless). It also undermined Lynam's lengthy testimony regarding his proposed ignition sequence.²³ The excluded evidence would also have cast serious doubt on the prosecution's argument regarding evidence of premeditation. RP 3565, 3574, 3576, 3059, 3179-80, 3196, 3652, 3679, 4333-34, 4403-04; CP 448.

Respondent's argument reflects a complete misunderstanding of the job Mann was hired to do. RSP 51-57. Mann was retained to critique Lynam's investigation. RP 3402, 3405, 3536-38, 3717, 4050; CP 446. He was not asked to determine the origin and cause of the fire. RP 3402, 3405, 3536-38, 3717, 4050; CP 446. Had someone asked him to determine the origin and cause, his investigation would have taken a different route; however, that was not the purpose of his work or his proffered testimony.²⁴

Instead, Mann's function was the same as Rice's – he was asked to evaluate Lynam's investigation. Like Rice, Mann familiarized himself with the facts of the case, not only by reading Lynam's reports, but also by and conducting his own testing—just like the testing performed by Rice.

²³ Lynam opined at length that someone had moved one or more beanbag chairs from the foosball table to the point of origin to start the fire. RP 2842, 2851, 2887-93, 2906-08, 2915-23, 3013-14, 3016-17, 3156-57, 3165, 3183-84, 3195. The prosecution relied on this testimony to prove premeditation. RP 4248, 4333-34, 4403-04.

²⁴ Conversely, had he claimed that he'd determined the origin and cause based on only a partial investigation, his testimony would have properly been excluded.

RP 21, 2433, 2449-52, 2510, 2481, 3392.²⁵

The trial court's decision was fundamentally unfair. The court allowed the state to bolster Lynam's conclusions with Rice's testimony, but prohibited Ms. Arndt from effectively attacking Lynam's conclusions with Mann's testimony, even though Mann and Rice performed the same role. The court also allowed the state to bolster Lynam's conclusions with Iskra's testimony, even though Iskra's origin and cause investigation was incomplete.

Respondent's misunderstanding mirrors that of the prosecutor at trial and the error made by the trial court. RSP 51-57. Since this confusion pervades the record below and Respondent's brief, a lengthy analogy is provided to ensure a better understanding of the issue.

Although presented in the context of a criminal trial, Mann's conclusion—that Lynam failed to properly investigate the origin and cause of the fire—is analogous to an assertion of malpractice. In medical malpractice cases, a plaintiff “must establish” that treatment fell below the applicable standard of care “through medical expert testimony.” *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). In *Keck*, as in other medical malpractice cases, the plaintiff retained an expert to testify that the treating physicians breached the applicable standard of care. *Id.*, at 373. Under Respondent's argument—that an expert such as Mann must

²⁵ In addition, since the scene was still available, Mann visited the scene. RP 1856, 2481, 3528, 3617, 3667-82, 3762; CP 447. This option was not available to Rice, because the scene had been destroyed by the time the state hired Rice.

perform a full origin and cause investigation before testifying—a retained medical expert would have to perform the procedure on the plaintiff to provide a factual basis for her or his testimony. Clearly, this is not required. *Id.* Medical experts may testify regarding a treating physician’s negligence, even if the testifying expert has not treated the plaintiff. *Id.*

Nor is a testifying expert limited to the information considered by the original professional whose work is under scrutiny. *Volk v. DeMeerleer*, --- Wn.2d ---, ___, 386 P.3d 254 (Wash. 2016). For example, in *Volk*, the plaintiffs sued a psychiatrist following a murder/suicide perpetrated by one of his patients. The plaintiffs’ expert opined that the treating psychiatrist breached the standard of care based on his review of “law enforcement files and reports surrounding the attack, and autopsy and toxicology reports,” in addition to the treating psychiatrist’s own clinical records. *Id.*, at ___. Obviously these police reports, the autopsy, and the toxicology reports were not available to the treating psychiatrist while he was providing treatment. Despite this, the Supreme Court believed it proper for the plaintiff’s expert to consider them in assessing the treating psychiatrist’s performance. *Id.*

The same is true here. Since Mann was not performing an origin and cause investigation, there was no basis to limit his testimony on grounds that he failed to follow the guidelines for an origin and cause investigation. Had he offered an opinion on the fire’s origin and cause, it would properly have been excluded. But the excluded evidence was not his opinion on the origin and cause. Instead, Ms. Arndt sought to introduce

Mann's opinions on the investigation spearheaded by Lynam, and the underlying facts supporting those opinions.

The lab test results would have been helpful to the jury. The results reflected negatively on Lynam's expertise and his credibility (since he testified that testing would have been fruitless). RP 3059, 3179-80, 3196. The results also undermined Lynam's proposed ignition sequence, involving application of open flame to a beanbag chair positioned near the couch. RP 2842, 2851, 2887-93, 2906-08, 2915-23, 3013-14, 3016-17, 3156-57, 3165, 3183-84, 3195. Finally, the excluded testimony would have helped the jury evaluate the prosecution's evidence of premeditation, since it tended to show that the beanbags remained on the foosball table and had not been moved to the area of the couch. RP 4248, 4333-34, 4403-04. For all these reasons, the lab test results were admissible under ER 401, ER 402, ER 702, and ER 403.²⁶ The court's decision excluding the evidence violated Ms. Arndt's constitutional right to present a defense. *Jones*, 168 Wn.2d at 720.

Fifth, the court improperly excluded Mann's opinion that the basement room went to flashover. RP 3893-94; CP 449.²⁷ This opinion would have been helpful to the jury: flashover can significantly affect the fire patterns used to determine the area and point of origin. RP 1508, 1516,

²⁶ It also supported Mann's opinion that Lynam's investigation was inadequate, and thus was admissible under ER 703.

²⁷ Lynam, Iskra, and Rice gave varying conclusions about flashover in the basement room. RP 1652, 1737-38, 1768-69, 1925, 3030-31, 4234.

1560, 1582, 1596, 1613, 1614, 1626, 1652, 1741, 1790, 1881, 1882, 1913, 2290, 2468, 2470, 2662, 2698, 2708, 2756, 2779, 2804, 2826, 3023, 3099, 3701, 3706, 3830, 3891, 3893-94, 3944; CP 449. An accurate determination of origin is a precondition to determining an incendiary cause. RP 1626, 1628, 1724, 1741, 1876-1877, 3023, 3042, 3692, 3706, 3814, 3891, 4262; CP 450. Lynam, Iskra, and Rice gave varying conclusions about flashover in the basement room; however, the weight of their testimony suggested that the room had not flashed over. RP 1652, 1737-38, 1768-69, 1925, 3030-31, 4234.

Mann's opinion (that the room flashed over) would have been helpful, and should have been admitted under ER 702. *See Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). According to Mann, Lynam's failure to properly identify flashover undermined the whole investigation. RP 1626, 1628, 1741, 3023, 3703, 3706, 3814, 3891, 4262; CP 449.

The evidence was also admissible to rebut the weight of testimony from Iskra, Lynam, and Rice on the subject. RP 1622, 1652, 1737-38, 1768-69, 1925, 4234. Without Mann's opinion, the evidence gave jurors the impression that the room had not flashed over, and eliminated an important critique of the investigation.²⁸ The trial judge violated Ms. Arndt's right to present a defense by excluding the evidence. *Jones*, 168 Wn.2d at 720.

²⁸ The court allowed Mann to say only that the room showed signs of having flashed over, but did not allow him to voice his conclusion. RP 3893-94.

Sixth, the court should have allowed Mann’s testimony regarding the visibility of smoke coming through the living room vents. The court sustained the state’s objection that the testimony involved “gathering data.” RP 3902. There is no evidence rule that prohibits an expert from gathering data.

The evidence was relevant to rebut Lynam’s opinion that smoke would have been immediately visible had an accidental fire started directly below. RP 2383-85, 2482, 2552, 2868-69, 3129-33. The ruling left jurors without evidence necessary to evaluate this claim. RP 2383-85, 2482, 2552, 2868-69, 3129-33. The evidence was relevant under ER 401, and admissible under ER 402 and ER 703. Its exclusion violated Ms. Arndt’s right to present a defense. *Jones*, 168 Wn.2d at 720.

Finally, even if Mann’s methodology somehow justified limitations on his testimony, the state opened the door to the excluded evidence by presenting the testimony of Rice and Iskra. *State v. Young*, 158 Wn. App. 707, 719, 243 P.3d 172 (2010); *State v. Hartzell*, 156 Wn. App. 918, 934, 237 P.3d 928 (2010). The trial judge should have accepted defense counsel’s argument on this point, and permitted Mann to testify in full. RP 3411-12.

Rice, like Mann, relied on police reports and other documentation. RP 21, 1895, 2422-23, 2449-52, 2481. Like Mann, Rice proposed and conducted additional testing, instead of relying on the four corners of Lynam’s report. RP 2433, 2510, 3392. Respondent’s argument that Rice did a technical review without “additional testing or experimentation” is

not supported by the record. RSP 62.

Iskra conducted only a partial origin and cause investigation at the scene, which is how Respondent characterizes Mann's work. RP 1856, 2481; RSP 51. Respondent's claim that the real problem with Mann's work was that he was "selective" reflects the misunderstanding of Mann's role as outlined above. Since he was critiquing Lynam's investigation on behalf of the defense, it made sense for Mann to focus on those areas that seemed most problematic. Nothing obligated him to conduct a partial but allegedly nonselective origin and cause investigation like that undertaken by Iskra.

Mann's methodology differed in emphasis but otherwise paralleled the approach taken by Rice and Iskra. The state presented their opinions and underlying data as legitimate; this opened the door to Mann's opinions and the facts upon which they were based. *Young*, 158 Wn. App. at 719. By relying on Rice and Iskra to bolster Lynam's conclusions while fighting to limit Mann's testimony, the prosecution painted "the very type of 'false picture' that the open-door doctrine seeks to avoid." *State v. Loughrey*, 47339-9-II, 2017 WL 34597, at *5 (Wash. Ct. App. Jan. 4, 2017) (unpublished).

The trial judge's decision denying Ms. Arndt the opportunity to present relevant evidence obtained in the same manner as the state's evidence gave the prosecution "an unfair advantage and limit[ed] the proof to half-truths." *Ang v. Martin*, 118 Wn. App. 553, 563, 76 P.3d 787, 792

(2003), *aff'd*, 154 Wn.2d 477, 114 P.3d 637 (2005).²⁹ The trial judge should have Ms. Arndt to introduce all Mann's opinions and the underlying facts supporting them. The exclusion of this evidence violated her right to present a defense. *Jones*, 168 Wn.2d at 720.

D. Hanson's proffered testimony was not hearsay; Respondent's argument reflects a misunderstanding of the definition of hearsay.

Fire Marshal Lynam directed his employees to avoid creating materials that could be used for cross examination by refraining from videotaping fire scenes and by limiting photographs. RP 333-36, 345. Requests or commands are not hearsay because they are not assertions of fact. *State v. Fish*, 99 Wn. App. 86, 96, 992 P.2d 505 (1999).

Indeed, a directive such as that Lynam made to his investigators "is, to a large degree, not even capable of being true or false." *United States v. Cruz*, 805 F.2d 1464, 1478 (11th Cir. 1986). Such directives are not hearsay. *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015); *see also Ruhl v. Hardy*, 743 F.3d 1083, 1099 (7th Cir. 2014); *United States v. White*, 639 F.3d 331, 337 (7th Cir. 2011); *United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999).

Respondent fails to recognize this, attempting to parse Lynam's

²⁹ As the Supreme Court has noted, "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

directive into “the instruction [and] the alleged reason for it.” RSP 64-65. Lynam directed his employees to minimize potential ammunition for cross examination, including videotaped and photographic evidence. RP 333-36, 345. The “instruction” and “the alleged reason for it” were one and the same. RP 333-36, 345.

Harmon should have been permitted to tell the jury of Lynam’s directive to his employees.³⁰ *Fish*, 99 Wn. App. at 96. The evidence would have helped to establish Lynam’s bias against criminal defendants, their lawyers, and the truth-finding function of trials. It had “a tendency to make the facts to which [Lynam] testified less probable in the eyes of the jury,” and thus was relevant and admissible under ER 401 and ER 402. *United States v. Abel*, 469 U.S. 45, 51, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).

Likewise misplaced is Respondent’s argument that the evidence was not relevant because Hanson “did not work in the office at the time of the investigation in this case.” RSP 65. But evidence is relevant if it has “any tendency” to make a material fact more or less probable, and the threshold to admit relevant evidence is low: even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). This is especially true in light of Ms. Arndt’s constitutional right to present her defense. *Jones*, 168 Wn.2d at 720.

³⁰ In addition, Hanson should have been allowed to testify about problems with evidence handling procedures at the fire marshal’s office. RP 334, 347.

Exclusion required the state to prove the evidence was “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.* Furthermore, because the evidence was highly probative of Lynam’s bias, no state interest was sufficiently compelling to warrant exclusion. *Id.* Respondent fails to address these standards. RSP 64-65.

The trial court erred by excluding the testimony, and the error violated Ms. Arndt’s right to present a defense. *Id.*

E. The errors are not harmless beyond a reasonable doubt.

It is the state’s obligation to prove that the trial court’s errors were harmless beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008). Had the court permitted Mann and Hanson to testify fully, jurors may have had doubts about Lynam’s investigation. The entire defense involved a challenge to Lynam’s conclusions, which the excluded evidence directly undermined. A reasonable juror may have decided to acquit after hearing the excluded evidence. *Id.* Ms. Arndt’s convictions must be reversed. *Id.*

II. RESPONDENT’S CONCESSIONS REQUIRE VACATION OF THE FELONY MURDER AND ARSON CONVICTIONS.

Respondent agrees that the felony murder conviction must be vacated. RSP 65-66 (citing *In re Strandy*, 171 Wn.2d 817, 256 P.3d 1159 (2011)). The arson charge must be vacated as well. *State v. Womac*, 160

Wn.2d 643, 658-660, 160 P.3d 40 (2007); *State v. Freeman*, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005).

The legislature has not expressly authorized punishment for arson and aggravated first-degree murder based on the same transaction. RCW 9A.32.030; RCW 10.95.030; *see State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). The “same evidence” test and the “merger” doctrine therefore apply. *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008).

The “same evidence” test prohibits multiple convictions when the evidence necessary to convict on one offense is sufficient to convict on the other. *In re Orange*, 152 Wn. 2d 795, 816, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005). The test does not rest on a comparison of the legal elements; instead double jeopardy is violated if the state used the same evidence to prove each offense. *Id.*; *Hughes*, 166 Wn.2d at 684. Double jeopardy is violated if the evidence used to convict on one charge also proves guilt of the other. *Orange*, 152 Wn.2d at 816.

Respondent concedes that “the two crimes were based on the same events.” RSP 69. This concession requires that the arson charge be vacated: the state’s evidence on the aggravated murder charge also proved her guilt of the arson. *Orange*, 152 Wn.2d at 816; *Francis*, 170 Wn.2d at 525. Specifically, to prove premeditated murder, the state introduced evidence that Ms. Arndt set a fire in the O’Neil house, after some deliberation, intending to kill Veeder. This evidence also proved that she knowingly and maliciously caused a fire which damaged a dwelling. RCW

9A.48.020(1)(b); CP 400.

Respondent erroneously suggests that double jeopardy is violated only if “proof of the same elements is necessarily required in all cases to establish the crimes.” RSP 69 (citing *Freeman*, 153 Wn.2d at 772-73). Respondent appears to suggest that reviewing courts need only compare the legal elements of each offense.

This is incorrect. The “same evidence” test focuses on the evidence actually produced at trial. *Orange*, 152 Wn.2d at 818-20. It does not focus on some hypothetical “proof... required in all cases.” RSP 69. Courts “consider the elements of the crimes as charged and proved, not merely [at] the level of an abstract articulation of the elements.” *Freeman*, 153 Wn.2d at 777.

Under the “same evidence” test, convictions for premeditated murder and arson, as charged and proved, violate double jeopardy. *Id.*; *Orange*, 152 Wn.2d at 818-820. The arson conviction must be vacated and the case remanded for a new sentencing hearing. *Womac*, 160 Wn.2d at 658-60.³¹

In addition, the arson charge merged with the aggravated murder charge and must be vacated for that reason as well. *Freeman*, 153 Wn.2d at 772-73. The merger doctrine applies when “the degree of one offense is

³¹ Respondent also makes a half-hearted argument regarding “contrary legislative intent,” pointing out only that the two crimes are found in different portions of the criminal code and address different evils. RSP 69. This is not the “clear evidence of contrary intent” required to overcome the presumption established by the “same evidence” test. *Womac*, 160 Wn.2d at 655.

raised by conduct separately criminalized by the legislature.” *Id.* In such circumstances, courts “presume the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Id.*

Here, the arson elevated the first-degree murder to an aggravated offense. CP 352-56; RCW 10.95.020(11)(e). The aggravated offense carries a mandatory penalty of life without possibility of parole. RCW 10.95.030(1). Because conduct separately criminalized by the legislature elevated the first-degree murder charge to an aggravated offense, the arson merges into the aggravated murder charge. *Id.*

Respondent erroneously argues that the merger rule does not apply to aggravated murder, when committed in the course of or in furtherance of arson, because the aggravator does not require proof of a completed arson. RSP 67-68 (citing *State v. Brett*, 126 Wn.2d 136, 170, 892 P.2d 29 (1995)). In making this argument, Respondent quotes passages out of context, implying that *Brett* stands for this rule.³²

Brett does not apply to Ms. Arndt’s case. The offender in *Brett* argued that “the use of more than one aggravating circumstances violates... double jeopardy.” *Id.*, at 168. He sought to merge one set of aggravators with another. *Id.*, at 169. The *Brett* court found no double

³² Respondent also erroneously suggests that the “continued validity of *Brett*” was confirmed by *State v. Benn*, 161 Wn.2d 256, 264, 165 P.3d 1232 (2007). RSP 68. The *Benn* case does not mention *Brett*. Furthermore, the issue in *Benn* differed from that addressed by the *Brett* court, although both involved aggravators and double jeopardy. (*Brett* dealt with multiple aggravators; *Benn* addressed successive trials on an aggravating factor). The *Hyllon* case, also cited by Respondent, addressed retroactivity and the ex post facto clause. RSP 68 (citing *State v. Hyllon*, 154 Wn. App. 945, 226 P.3d 246 (2010)).

jeopardy violation. *Id.*, at 170. The court reasoned that the aggravators could be established without proof of the completed crime, and thus were neither ‘charged offenses’ nor crimes for which the defendant had already been prosecuted. *Id.*

Ms. Arndt is not arguing that the arson aggravator should merge with some other aggravator. She is arguing that the arson conviction is “conduct separately criminalized by the legislature.” *Freeman*, 153 Wn.2d at 772-73. Because it aggravates the murder charge, the court should presume the legislature intended to punish both offenses by mandating imposition of life without possibility of parole—“a greater sentence for the greater crime.” *Id.*

Furthermore, “[w]hen dealing with merger issues, [courts] look at how the offenses were charged and proved, and do not look at the crimes in the abstract.” *State v. Whittaker*, 192 Wn. App. 395, 411, 367 P.3d 1092 (2016). Thus, it is immaterial that the murder charge *could* be aggravated in the absence of a completed arson. In this case, the state charged and proved a completed arson, and used that completed arson to aggravate the murder.

The arson merges with the aggravated murder charge. *Id.*, at 409-417. The arson conviction must be vacated, and the case remanded for a new sentencing hearing.

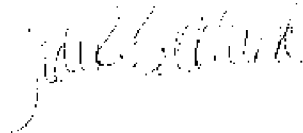
CONCLUSION

The convictions must be reversed and the case remanded for a new trial, with instructions to admit the improperly excluded evidence.

Alternatively, the felony murder and arson convictions must be vacated.

Respectfully submitted on February 15, 2017,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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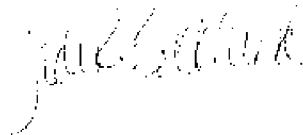
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 15, 2017.



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BACKLUND & MISTRY

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